Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

No. 91-21

In The

Supreme Court of the United States

October Term, 1991

OVERNITE TRANSPORTATION CO.,

Petitioner,

v.

BETTY L. TIANTI, COMMISSIONER OF LABOR OF THE STATE OF CONNECTICUT,

Respondent.

Petition For A Writ Of Certiorari To The Second Circuit Court Of Appeals

BRIEF OF THE RESPONDENT IN OPPOSITION

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut

PATRICIA M. STRONG
Assistant Attorney General
(Counsel of Record)
P.O. Box 120
Hartford, CT 06141-0120
(203) 566-7014

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Overnite Transportation Company (hereinafter "Overnite") has brought a petition for a writ of certiorari asking this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit which held that the dock workers employed at Overnite's Wallingford, Connecticut trucking terminal were not exempt from Connecticut's overtime statutes and further that the State of Connecticut was not preempted by federal statutes from requiring Overnite to pay overtime to those employees. *See* Appendix attached to Overnite's Petition (hereinafter "App.") pp. 1a-6a. This judgment and opinion affirmed in all respects the decision of the United States District Court for the District of Connecticut granting summary judgment in favor of Betty L. Tianti,[1] former Commissioner of Labor of the State of Connecticut (hereinafter "Commissioner") in the two consolidated actions. App., pp. 7a-16a.

The sole claim upon which Overnite seeks this Court's review is the preemption question. Petition, pp. 1-2. Specifically, Overnite urges this Court to find that Connecticut General Statutes § 31-76c is violative of the United States Constitution's Commerce and Supremacy Clauses, Article I, Section 8 and Article VI, as it applies to these dock workers. Section 31-76c provides:

> No employer, except as otherwise provided herein, shall employ any of his employees for a work week longer than forty hours, unless such

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[1] On February 1, 1991, Ronald F. Petronella became Commissioner of Labor.

> employee receives remuneration for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

App., p. 43a.

The District Court awarded to the Commissioner the sum of $27,322.72 in unpaid overtime wages and $3,414.34 in prejudgment interest, for a total amount of $30,738.36. App., p. 8a. The District Court held that the employees involved, who loaded trucks on the premises of Overnite's Wallingford, Connecticut terminal, were not exempt from the overtime requirements under § 31-76i (a) of the Connecticut General Statutes. App., p. 14a. The District Court further held that the State of Connecticut was not preempted by federal law, either in the Fair Labor Standards Act (hereinafter "FLSA") or the Motor Carrier Act (hereinafter "MCA") from requiring overtime wages for those workers. App., p. 16a.

Overnite claims that § 31-76c is preempted by the MCA, 49 U.S.C. §§ 3101 through 3104, and the FLSA, 29 U.S.C. §§ 201 through 219. No particular language in any statute is claimed to preempt state overtime wage regulation. Rather, Overnite claims that three decisions of this Court mandate a finding of preemption in this case: *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Levinson v. Spector Motor Service,* 330 U.S. 649 (1947); and *Southland Gasoline Co. v. Bayley,* 319 U.S. 44 (1943).

The employees in this case are exempt from the overtime requirements of the FLSA pursuant to 29 U.S.C. § 213 (b)(1) and its corresponding regulation found in 29

C.F.R. § 782.5 in that they are "loaders." *See* Stipulation, paragraph 8, App., p. 18a.

The Respondent Commissioner submits, and the Second Circuit and District Court so found, that the MCA does not prohibit and the FLSA specifically permits states to require overtime pay for federally exempted workers. Title 29 U.S.C. § 218 (a) provides in relevant part:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter. . . .

Respondent's Appendix, p. A1.

ARGUMENT

I. DECISION OF THE SECOND CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THIS COURT IN *LEVINSON V. SPECTOR MOTOR SERVICE,* 330 U.S. 649 (1947); *SOUTHLAND GASOLINE CO. V. BAYLEY,* 319 U.S. 44 (1943); AND *CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.,* 411 U.S. 624 (1973).

Four Circuit Courts of Appeals have considered the issue raised here and have concluded that federal law does not preempt state and local governments from requiring overtime pay for workers exempt under federal

law.[2] *Agsalud v. Pony Express Courier Corp. of America*, 833 F.2d 809 (9th Cir. 1987); *Pettis Moving Co. v. Roberts*, 784 F.2d 439 (2d Cir. 1986); *Central Delivery Service v. Burch*, 486 F.2d 1399 (4th Cir. 1973), *mem. aff'g* 355 F. Supp. 954 (D. Md.); and *Williams v. W.M.A. Transit Co.*, 472 F.2d 1258 (D.C. Cir. 1972).

This uniformity by the Circuits is not surprising because the purported conflict with Supreme Court precedents, which the petitioner seeks to establish, is illusory. The claimed conflict with the three decisions of this Court cannot be sustained. None of the cases relied on concerned state regulation of overtime wages. Two cases concerned the FLSA exemption pursuant to § 213 (b)(1). The third case did not involve wages under the FLSA or the MCA.

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[2] The decision in this case was the second time the issue was before the Second Circuit. The Ninth Circuit also reached a similar result under another exemption in *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), holding that California could require overtime pay for seamen exempt under § 213 (b)(6) of the FLSA.

In addition, it is noted that two state Supreme Courts have reached the same conclusion on the preemption issue. *Plouffe v. Farm and Ranch Equipment Co.*, 174 Mont. 313, 570 P.2d 1106 (1977), held that the FLSA exemption in 29 U.S.C. § 213 (b)(10)(A) did not preempt Montana from requiring overtime pay for a farm equipment mechanic. In *Dept. of Labor & Industries of the State of Washington v. Common Carriers, Inc.*, 111 Wash.2d 586, 762 P.2d 348 (1988), the Washington Supreme Court sitting *en banc* held that the state was not preempted by the MCA from requiring overtime pay for a truck mechanic employed by an interstate carrier.

In *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), the Court resolved a conflict of authority between the Fourth and Eighth Circuit Courts of Appeals on the issue of whether the exemption in § 213 (b)(1) of the FLSA applied to employees of private carriers of property over whom the Interstate Commerce Commission ("ICC") had authority, even though it had not actually been exercised. The Court concluded that the existence of the authority was sufficient. *Id.* at 47-48. The Court stated with regard to the interplay between the MCA and the FLSA: "The amendment [§ 213 (b)(1)] was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers." *Id.* at 48-49. Nothing in the case dealt with preemption of any state regulation of overtime.

In *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947), this Court affirmed the decision of the Supreme Court of Illinois and held that the ICC had the power to regulate employees who did not perform exempt duties during all their working hours. In that case, the workers spent part of their time as loaders and part of their time as "checkers" or "foremen." The Court held that the worker's activities:

> affected the safety of operation, although it does not appear what fraction of his time was spent in activities affecting safety of operation. As a consequence, he comes within the power of the Commission to establish qualifications and maximum hours of service with respect to him and, by the express terms of § 13 (b)(1) of the Fair Labor Standards Act, he is excluded, automatically, from the benefits of § 7 of that Act.

Id. at 681. Any worker subject to the MCA is, therefore, exempt from the FLSA. Nowhere did the Court mention state regulation of overtime or preemption.

In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Court considered whether a city ordinance prohibiting jet aircraft from taking off between 11:00 p.m. and 7:00 a.m. from the local airport violated the Federal Aviation Act and the Noise Control Act. In affirming the District Court's and the Ninth Circuit's findings of preemption, the Supreme Court held that: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." *Id.* at 633. The Court also stated:

> Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question.

Id. at 638.

It is clear from a review of the cases cited by Overnite that the Second Circuit's decision does not, as claimed by petitioner, conflict with the holdings of *Southland Gasoline, Levinson* and *City of Burbank*. Moreover, these cases are devoid of any dicta to support petitioner's position.

II. THE MOTOR CARRIER ACT DOES NOT PREEMPT CONNECTICUT'S WAGE AND HOUR ACT, AS APPLIED TO OVERNITE'S LOADING DOCK WORKERS.

The sole case decided by this Court concerning preemption of state law by the MCA is *California v. Zook*, 336

U.S. 725 (1949). In that case, this Court decided that the State of California could make it unlawful to sell or arrange for interstate transportation of persons over public highways by a carrier without a permit from the ICC. The Court found nothing in the language of the MCA or its legislative history to directly answer the preemption question, except "an expression of deference to State action on intrastate commerce." *Id.* at 733 fn. 9. In the absence of a conflict between the state and federal statutes, there was no reason to "justify the thwarting of state regulation." *Id.* at 733. The Court also stated that such questions "can be resolved only by careful scrutiny of the activity regulated." *Id.* at 734. The interpretation of 49 U.S.C. § 302 (b) [now 49 U.S.C. § 10521 (b)] in the footnote *supra*, p. 733 indicates that the states are not limited to regulating intrastate transportation and the payment of taxes as claimed in Overnite's statutory interpretation analysis of § 10521 (b) at pages 11 and 25 of its petition.[3]

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[3] Petitioner Overnite did not raise this statute, 49 U.S.C. § 10521 (b), as a source of preemptive language or as a limit to state authority over motor carrier workers until this petition was filed. *See* Stipulation with Issues of Law, App., pp. 17a-19a, as well as the decisions of the Second Circuit, App., pp. 1a-6a, and the District Court, App., pp. 14a-16a. Overnite's preemption claim throughout this litigation has been based on the premise, as stipulated by the parties, that the FLSA § 213 (b)(1) preempts state regulation of overtime in § 31-76c of the Connecticut General Statutes. The issue that Overnite raises for the first time in its petition seeking this Court's review, *i.e.*, that 49 U.S.C. § 10521 (b) expresses a Congressional intent to limit states to taxation and intrastate transportation, was never articulated to the lower courts. In the light of the precedent of this Court in *California v. Zook*, 336 U.S. 725 (1949), however, the argument has no validity.

None of the cases cited by Overnite pertain to an analysis of the MCA. Moreover, there is simply no conflict between the Connecticut statute and the MCA.

The MCA provides for regulation by the Secretary of Transportation of the maximum hours and qualifications of drivers, drivers' helpers, loaders and mechanics employed by interstate motor carriers. The Respondent Commissioner does not regulate the qualifications or set maximum hours of the dock workers in this case. The Connecticut statute (§ 31-76c) at issue, simply requires that all employees be paid time and one-half for all hours worked over 40 in a week.

As stated by the District Court in this case:

> A state's traditional police powers, such as are involved in Connecticut's regulation of overtime wages, are not preempted by federal law unless preemption "was the clear and manifest purpose of Congress." Ray v. Atlantic Richfield, 435 U.S. 151, 157 (1978) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

App., p. 14a.[4]

In *Pierce v. Cook & Co.*, 437 F.2d 1119, 1126 (10th Cir. 1970), the Tenth Circuit Court of Appeals held that state law was not preempted by the MCA and stated that:

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[4] Contrary to any implications that can be drawn from statements at pages 25-26 of Overnite's petition, *Ray v. Atlantic Richfield*, 435 U.S. 151 (1978), did not involve the MCA. Rather, the issue was whether the State of Washington's Tanker Law was preempted by the federal Ports and Waterways Safety Act of 1972.

> There is no language in the Motor Carrier Act indicating any intent of Congress to supersede state tort law with respect to negligence or wrongful death liability of a shipper. Hence, state law governs with respect to Cook's liability in the instant case.

Id. Overnite has cited no case which held that § 10521 (b) specifically, or the MCA generally, sets limits on the authority of states to regulate commerce.

This Court has recognized and recently affirmed the view that: "The States have traditionally regulated the payment of wages, including vacation pay." *Massachusetts v. Morash*, 490 U.S. 107, 119 (1989).[5] In rejecting the pre-emption claim raised in that case, this Court stated:

> Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority presented in our federalist system."

Id. See also the case quoted therein: *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 19 (1987).

Overnite has failed to show any conflict between its compliance with both the MCA and the Connecticut overtime statute. As admitted by Overnite at pages 24-25 of its petition, there is no express language in the MCA

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[5] In *Massachusetts v. Morash*, 490 U.S. 107 (1989), the defendant employer was charged with a criminal violation of the Massachusetts wage payment statute. The employer claimed that its policy of paying unused vacation time to discharged employees was an "employee welfare benefit plan" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002 (1), and, therefore, that state criminal action to enforce the policy was preempted.

preempting state laws regulating overtime. There is, however, as noted by the courts which have considered the issue, a federal statute, § 218 (a) of FLSA, which specifically allows the states to set more stringent overtime standards than the federal. While Overnite claims that § 218 (a) does not apply to FLSA exempt workers, it has no legislative history or case law to cite in support of that theory.

The fallacy of Overnite's argument is illustrated in *Williams v. W.M.A. Transit Company,* 472 F.2d 1258 (D.C. Cir. 1972). In that case, the District of Columbia Circuit Court of Appeals interpreted the District of Columbia Minimum Wage Act of 1966, an Act of Congress for the local governance of the District of Columbia. The Act did not contain an exemption for bus drivers, who are exempt as drivers under § 213 (b)(1) of the FLSA. The Court concluded that Congress' omission of the exemption in the District of Columbia Act taken together with § 218 (a) of the FLSA permitting more liberal state and local benefits to employees demonstrated a Congressional intent that the drivers be covered by the District overtime requirement. *Id.* at 1263.

The language in *Levinson v. Spector Motor Service,* 330 U.S. 649, 661-662 (1947), quoted in Overnite's petition at pp. 19-20, is fully supportive of the lower courts' rulings here:

> There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done in excess of the limits set in § 7 of the Fair Labor

> Standards Act. Such overlapping, however, has not been authorized by Congress [footnote omitted] and it remains for us to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the benefits of the compulsory overtime pay provisions of the Fair Labor Standards Act.

The "overlapping" referred to is that of the "jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." *Id.* at 661.

Congress has failed to expressly preempt state overtime regulation in the MCA. Congress has expressly allowed the District of Columbia and the states and municipalities to have more stringent overtime standards in § 218 (a) of the FLSA. The cases cited by Overnite involve matters other than wages and statutes other than the MCA. All of the cases which have considered the specific issue involved in this petition have been decided in favor of the Respondent Commissioner's position, as did the District Court and the Second Circuit Court of Appeals in this case. As was the case with the District of Columbia, the State of Connecticut similarly is not prohibited, therefore, from requiring Overnite to pay its loaders overtime.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this matter should be denied.

Respectfully submitted,

Respondent
Commissioner of Labor of
the State of Connecticut

RICHARD BLUMENTHAL
Attorney General

PATRICIA M. STRONG
Assistant Attorney General
(Counsel of Record)
P. O. Box 120
55 Elm Street
Hartford, CT 06141-0120
Telephone: (203) 566-7014

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29 U.S.C. § 218 (a) A1

FAIR LABOR STANDARDS ACT

29 U.S.C.

§ 218. Relation to other laws.

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.